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DIFFICULTIES INHERENT IN THE QUESTION OF FOREIGN DIVORCES.

Few questions of law have given jurists and judges greater difficulty than the questions relating to efficacy of foreign divorces. The question of the domicile of a married woman for the purpose of divorce was fully discussed in 91 Cent. L. J. 24. But this discussion has aroused other inquiries which we desire to discuss only in their broad and general aspects.

There can be no doubt that viewing the marriage relation not as a contract but as a status, the law of the husband's domicile or nationality should control. It is that law that gives effect to the relation and which determines its obligations and continuance.

Conceding that the law of the domicile or (as in the law of continental Europe) the law of the nationality of the parties should control the right to a divorce it is contended by some jurists that foreign courts may nevertheless take jurisdiction of a suit for divorce if the parties are properly brought into court, applying, however, the law of the parties' domicile to determine the right to a legal separation. But there are many objections to this practice. In the first place no court would wish to sever a status created and existing in and under the law of another state. In the second place it is doubtful whether, considering the action for divorce as a suit *quasi in rem*, whether the *res*, the matrimonial status, is within the jurisdiction of the court unless it has been properly brought within such jurisdiction by both the parties, or at least one of them, taking up their abode within the state, *animo manendi*.

But whatever may be the right of one state to divorce mere residents within that jurisdiction, it is clear that it is not incumbent upon the state of the domicile or nationality of the parties to recognize such separation as valid or binding. (Babcock v. Haddock, 201 U. S.)

These few general observations will suffice to indicate the difficulty of solving the problems ensuing out of the application of interstate divorce laws and policies. Laurent, the great French jurist, threw up his hands, after attempting to reconcile the conflicting views of continental jurists and declared the problem "unsolvable." There is little wonder therefore that in England and America the same difficulties should be encountered, since in both these countries the problem is further complicated by the differences between the laws of local subdivisions as well as of nationality. This makes the question of domicile, in these countries, of supreme importance.

A question upon which the English courts hesitated for some time was whether it was possible to conceive of a matrimonial domicile separate and distinct from the domicile of the parties. In the important case of Le Mesurier v. Le Mesurier (1895), L. R. App. Cas. 517, it was held that an English couple residing for several years in Ceylon but with no intention of permanently remaining there had not acquired a "matrimonial domicile" in Ceylon for the purpose of giving the courts of that colony jurisdiction to grant a divorce.

The rule generally accepted by continental jurists with respect to foreign divorces is so succinctly summarized by Von Bar in his celebrated treatise on Private International Law (Gillespie's tr. 1892, p. 381) and so clearly outlines those few principles upon which juridical scholarship is now ready to agree that we quote the entire paragraph. The learned author says:

"Divorce, and that paramount judicial separation, which in many respects is equivalent to it, recognized by those systems of law which have no real divorce to the effect of completely dissolving the marriage tie, are subject to the national law, or the law of the domicile of the spouses. It can never be the purpose of any system of law

to determine whether a marriage subsisting between foreigners is dissoluble, or to say on what conditions it may be dissolved. . . . A decree of divorce, therefore, pronounced by any other judge but that of the domicile or nationality, is to be regarded in all other countries as inoperative. If a different view were to be taken, the subjects of a state could easily defeat the law by which they are absolutely bound.

"On the other hand the place in which the marriage was celebrated is of no importance. The other view which proposed that the law of that place should rule, held divorce to be a contract right of the spouses. If this opinion were correct, no law to regulate divorce could apply to marriages contracted before its promulgation. But marriage, although it rests upon the intention of private parties, is a part of the *jus publicum*, and the spouses are absolutely subject to the *jus publicum* of the place in which they are domiciled.

"From this the next step is, that the nationality or domicile of the spouses *at the date of the action*, and not at the date of the marriage, or the event on account of which divorce is sought, must rule. Some English judges at one time contended that a marriage concluded in England could only be dissolved by English law; in later times, however, there seems to be an inclination rather to take the view that the acquisition of a bona fide domicile, in the country where divorce is sought is necessary, and is all that is necessary.

"The place, too, in which the act which is said to constitute the ground of divorce was committed, is, as we think, of just as little consequence. We are not here concerned with any question of criminal law, but with an alteration of personal status. If then something took place which is no ground for divorce by the personal law of the spouses at the time, but is a ground for it by a personal law which they afterwards acquire, and if the thing which took place had no continued existence, happened once for all—if, for instance, by the earlier law simple adultery by the husband is not a ground on which the wife can sue for divorce, but must be accompanied by some other qualification, while by their subsequent law simple adultery is enough — a change of nationality (or domicile) cannot elevate to the rank of a ground for divorce the circumstances which took place under the dominion of the former law."

The general principles here so carefully and succinctly stated by Von Bar may well be made the basis for harmonizing the conflicting views of the various States on the subject of foreign divorces. A proper conception of the underlying principles of a subject of law are often more conducive to uniformity and clarity of judicial decisions than the more rigid requirements of a rule or statute imposed from without.

NOTES OF IMPORTANT DECISIONS.

MISSPELLING OF WORD IN AN INDICTMENT.—Whether a misspelled word in an indictment is reversible error depends on whether it misleads the defendant and is thus prejudicial to him in the preparation of his defense. On this point our courts are becoming more and more liberal so that it is no longer possible for a defendant to conceal the discovery of a mere technical defect in the petition until after conviction and then use it to overturn the verdict of the jury. Cases of misspelling come within this category. Garza v. State, 222 S. W. 1105. In this case, the Texas Court of Criminal Appeals holds that a defendant convicted of carrying a "pistol" could not complain on appeal that he was charged with carrying a "pistle."

The attorney for defendant labored in vain to convince the Court that the word "pistle" means communication and that there is a fatal variance between the allegations and the proof. The very effective answer which the Appellate Court made to this contention is illustrated by the following quotation from the Court's opinion. The Court said:

"The complaint and information charge appellant with carrying a 'pistle.' The testimony shows that he carried a 'pistol.' Objection was made to this testimony on the ground of variance between the allegation and proof. It is urged that 'pistle' is a word meaning a communication, and that the well known rules of idem sonans and bad spelling do not apply. Appellant's authority for asserting that 'pistle' is the name of a communication is the Century Dictionary. Reference thereto discloses that said work prints said word as obsolete and quotes Mr. Chaucer, who wrote in Old English some 700 years since, as using it. We do not think that the fact that an early English poet, in the exercise of his license, should have used this word in that sense, would necessarily give it any standing at this time, or would likely mislead a Brazoria County Mexican, defended

by a pair of able lawyers, into the mistake, in preparing for trial upon a charge of unlawfully carrying a 'pistle' of seriously thinking himself charged with unlawfully carrying a communication. The word 'pistle' does not seem to be given in any of our other dictionaries to which this court has access, and we are inclined to hold the word, as used in the information and complaint herein, idem sonans with 'pistol,' and that the rule of bad spelling will apply and, further, that it is evident that the word 'pistol' was intended. The evidence that appellant had a pistol on his person in a public place was uncontroverted."

INJUNCTION AGAINST CARRIER FOR REFUSAL TO ACCEPT FREIGHT DELIVERED ON NON-UNION TRUCKS.—The efforts of class units in the social organization to dominate the society of which they are a part is one of the peculiar manifestations of our present civilization. This struggle is becoming more intense and more complicated and the power which the various labor unions and farmers' organizations are able to display is amazing to all except those who have carefully studied the recent changes in the social reorganization which has been going on for more than a decade.

The threat and apparent ability of a single labor union to tie up industry and endanger the lives of millions by refusing to mine coal last winter opened the eyes of many to a power which while it has hitherto been in the main wisely used, might, in the hands of the enemies of law and order, be used to overthrow all authority and government. This evidence of class power is not confined to labor unions. Farmers' selling organizations have threatened to cut off the food supply of the country unless prices were raised. The Milk Producers of Southern Illinois are at present enforcing an embargo on milk delivered to the great City of St. Louis until a difference of 5 cents per hundred pounds between them and the distributors can be adjusted! And even at the present time the press reports contain the defiant demand of cotton planters for 40c a pound for cotton or no cotton will be ginned!

But what are the courts doing to protect society from dangers which every one sees are impending unless some restrictions are placed upon the growing power of these voluntary organizations? Nothing whatever. More than that, they are doing worse than nothing. If the recent decision by Justice Hand of the United States District Court in the recent case of Buyer v. Old Dominion Transportation Co., is followed we may as well resign ourselves to government by classes. For in this opinion, not only will the court refuse to enjoin a secondary boycott but will permit such boycott to be set up as a defense to the failure to perform a duty imposed by law.

In that case the defendant steamship company, a common carrier, refused to accept plaintiff's shipment because it was delivered to their dock on a non-union truck. The court refused an injunction to compel defendant to accept such shipment. The reason for the decision was that a court of equity will not compel a common carrier to accept for carriage merchandise tendered on a particular truck when by so doing its freight handlers will leave its employ and it will not be possible to replace such employes, thus causing serious inconvenience and damage to other shippers, when the complainant can avoid such situation by delivering merchandise to the carrier's dock by other trucks.

This decision distinctly recognizes the secondary boycott. It declares that an organization can threaten a strike not for its own good but to serve the interests of another class. It goes even further and declares that an employer of labor must yield to the demands of a labor union not to trade with a particular individual even though the law of the land declares he shall trade with him. A common carrier must accept any shipment tendered to it. Is it possible that a voluntary organization can by its decree override the law and declare that the carrier shall not accept shipments delivered in non-union trucks? The court's reasons are clearly those of expediency and convenience. The learned judge said:

"The Old Dominion Line avowedly is carrying merchandise for the public in general, but has expressed its inability to receive and forward complainant's merchandise because such action would involve the discharge of its employes, with the further probable result that it could get no others competent to do the business. I find no reason to suppose that its acts have not been done in good faith and that it does not desire to handle the complainant's merchandise; the facts are all to the contrary.

"In considering subdivision 4 of section 14 and subdivision 1 of section 16 of the Shipping Act it is to be noted that what is prohibited is unfair or unjust discrimination and undue and unreasonable prejudice and disadvantage, and what was undoubtedly primarily in contemplation was preferring without reason the cargo of one shipper in respect to space, loading and landing of freight, and discriminating in favor of particular shippers, either for business or personal reasons. I doubt very much whether it can be regarded as unfair, unjust or unreasonable to fail to carry forward the goods of a particular shipper if the carrier, in good faith, attempts to do this and finds that further pursuit of the matter will involve the loss of the only available employes, and will be likely to paralyze all transportation by water between such important points as Norfolk and New

York. At any rate, it is not a case where I think a court of equity should interfere by giving injunctive relief. If the complainant has a remedy at law for damages he can avail himself of it, and ought not to be allowed an injunction because he prefers a non-union carrier at so great an apparent expense to public convenience. I shall therefore deny an injunction."

The court also refuses to enjoin the labor unions themselves but we have no criticism to make of this part of the decision in view of the provisions in Section 20 of the Clayton Act prohibiting injunctions in cases of strikes, except where necessary to prevent irreparable injury. This section has not been construed by the Supreme Court. The United States Circuit Court of Appeals has held that this section practically legalizes secondary boycotts if unaccompanied by malice, force, violence or fraud. We are not inclined to object to a restriction on the use of injunction to compel men to work. But we see no excuse whatever for the courts to refuse to enforce by injunction the duty of a common carrier to accept goods simply because somebody has threatened the carrier with some injury if it performs its duty. It were better to tie up all the shipping in New York and elsewhere until it is determined whether the law is supreme or whether there exists a power able at its will to say when a law shall be obeyed and when it shall not be obeyed.

CAN YOUNG CHILDREN BE CONTRIBUTORILY NEGLIGENT?

The law of negligence in respect of very young children has been subject to considerable fluctuation and cannot yet be said to have attained to a definite position. One cause of this fluctuation is that cases in which young children are concerned are usually "hard cases" which enlist the sympathy of judge and jury with a result that the pure doctrine of law is diverted from its strictly proper course. Generally speaking, the decisions have swayed between two extremes. On the one hand, there has been a tendency to hold that young children are in the same position in the eye of the law as are adults, in the sense that if they are not able to take care of themselves, their parents should take care of them and the helplessness of the child is no ground for inferring negligence against the alleged wrongdoer. On the other hand, there is the tendency, and a very strong one, to hold that young children cannot be guilty of contributory negligence and that it is the duty of those concerned where young children are in possible danger to take every care that they are not hurt.

In the recent leading cases a sort of compromise between these positions has been struck. Beginning with the decision of the House of Lords in Cooke v. Midland Great Western Railway of Ireland,[1] we find that according to the headnote in that case "a railway company kept a turntable unlocked (and therefore dangerous for children) on their land close to a public road. The company's servants knew that children were in the habit of trespassing and playing with the turntable, to which they obtained easy access through a well known gap in the fence which the company were bound by statute to maintain. A child between four and five years old, playing with other children on the turntable, having been seriously injured, held that there was evidence for a jury of actionable negligence on the part of the railroad company." Lord Macnaghten quoted the following statement of Lord Denman:[2] "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." His lordship continued, "If that proposition be sound, surely the character of the place, though, of course,

(1) (1909) A. C. 229.
(2) Lynch v. Nurdin (1 Q. B. 29).

an element proper to be considered, is not a matter of vital importance. It cannot make very much difference whether the place is dedicated to the use of the public or left open by a careless owner to the invasion of children who make it their playground."

Hamilton, L. J. (now Lord Sumner) in Latham v. R. Johnson & Nephew, Ltd.[3] said that "case (i.e., Cooke's case) has been several times considered both in England, Scotland and Ireland. The Court of Appeal in Ireland in Coffee v. M'Evoy[4] declined to regard it as a case on the duty of an owner or occupier of property towards a trespasser, and decided against the injured plaintiff there because he clearly was a trespasser. In Lowery v. Walker[5] in the Court of Appeal, the reversal of which case in the House of Lords does not affect the present point, Buckley, L. J., treats the decision as being one upon which the liability 'may arise from the fact that the landowner knows that he is exposing the persons whom he allows to pass over his ground to danger of which he is aware and they are not,' and Kennedy, L. J., says of it: 'That it is in my opinion a decision of plainly limited application * * * depending upon the special circumstances * * * that there was an allurement to children by reason of the condition in which the defendants kept their premises, and the existence thereon of this unprotected machine, and that they knew that such a machine would be likely to allure children.' In Jenkins v. Great Western Railway,[6] in this court, all the members of the court[7] stated that in their opinion *Cooke's* case was decided on the assumption that Cooke was licensed by the railway company not merely to come upon the land, but to play with the turntable, and it is the case that the jury had found in terms that the child was allured 'through the hedge and up to the turntable.' Lord Kinnear says the same in Holland v. Lanarkshire Middle Ward District Committee,[8] that in *Cooke's* case the railway company had 'tempted children to play.'"

According to these cases where the element of allurement is wanting the law apparently is that a child can either personally or through the carelessness of its parents be held to have contributed by its own negligence to the injury sustained. As an instance of this, there is the decision of the First Division in the Court of Session in Stevenson v. Corporation of Glasgow.[9] That action was brought against the Glasgow Corporation in respect of an action which had also occurred at the Botanical Gardens, Glasgow. An infant child was drowned in the River Kelvin while playing in the garden. An action of damages was brought by the father of the child against the defenders on the ground that it was their duty to fence the river, as it was a danger to the public and especially to children. The court dismissed the action as irrelevant. At the end of his opinion Lord Kinnear said: "There is nothing unlawful in making a public garden or in opening a garden to the public in a place where there are streams or ponds, and if the place is made safe for persons of average intelligence I know of no rule of law which requires the proprietors to take further precautions. It is impossible to lay upon the defenders a duty to protect children from risks which arise only from their own childishness and helplessness. That is the office of parents or guardians."

The principle was applied recently by Lord Hunter in the case of Taylor v. The

(3) L. R. [1913] 1 K. B. at p. 417.
(4) [1912] 2 I. R. 290.
(5) [1910] 1 K. B. 173.
(6) [1912] 1 K. B. 525.
(7) The Master of the Rolls at p. 532, Fletcher Moulton L. J. at p. 534, and Farwell L. J. at p. 534.

(8) [1909] S. C. 1142.
(9) [1908] S. C. 1034.

Corporation of Glasgow,[10] which in unique circumstances raises a question of wide importance for all local authorities. The plaintiff in this action sought to recover damages from the corporation of the City of Glasgow for the death of his son John MacKay Taylor, who died on August 21, 1919. It appears that on August 20 of that year the pursuer's son, aged 7, proceeded with some other children to the Botanic Gardens, Glasgow. The defenders are the proprietors and custodians of these gardens, which are open to the public as a public park. On the date in question the children are said to have been playing on ground surrounding the bandstand. In the vicinity of this place there is an enclosed plot of ground in which specimen plants and shrubs of various kinds are grown. A wooden fence surrounds this plot of ground, access being obtained by a gate in the fence. According to the pursuer's case the defenders knew that this plot of ground was frequented by members of the public of all ages.

Among the plants growing in the plot of ground was a shrub, *atropa belladonna,* bearing berries rather similar in appearance to small grapes and presenting a very alluring and tempting appearance to children. The pursuer says that his son and some of his companions were attracted by the beautiful and tempting appearance of the shrub, that they picked some of the berries and ate them, and shortly afterwards they became seriously ill, and that although he received medical attention the pursuer's son died the following morning.

The berries of the *atropa belladonna* shrub are poisonous, and the pursuer maintained that the death of his son was solely due to the fault of the defenders and of their servants in charge of the gardens for whom they were responsible. He alleged that the poisonous character and the inviting and deceptive appearance of the berries were well known to them. "They knew or ought to have known, if they had exercised reasonable supervision, that said shrub was growing in a conspicuous position in said gardens, in a part open to and much frequented by children, and that it was probable and indeed practically certain that children would be tempted and deceived by the appearance of said shrub, and would eat the berries, which have a sweet taste. The defenders knew or ought to have known that said berries were a deadly poison and that if one or two of them were eaten by a child it was certain to cause illness and likely to result in death. The defenders were in fault in having the said shrub growing in a part of said gardens open to children and frequented by them without taking any precautions, as they ought to have done but failed to do, to warn children against the danger or to prevent children from reaching said shrub and picking the berries." His Lordship pointed out that it is well known to all who frequent botanical gardens that the plants and shrubs are not intended to be tampered with, and in particular that berries or fruit growing on trees are not to be eaten. There was nothing in the pursuer's averments to suggest that the defenders in the management of their garden failed to take precautions which are usually taken in connection with similar gardens. The berries of many plants, some of them common plants that grow wild in different parts of the country, are dangerous if indiscriminately eaten by children. It was not clear from the record what precautions the pursuer suggests should be taken by the defenders to protect children from the consequences of their own ignorance or thoughtlessness. In effect his Lordship held that the element of allurement being absent *Cooke's* case did not apply and therefore the case of Stevenson v. The Corporation of Glasgow was applicable and for these reasons he dismissed the action.

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(10) 2 S. L. T. 75.

WILL THE EIGHTEENTH AMENDMENT OVERWHELM THE FEDERAL COURTS?

A vice inherent in the 18th Amendment, arising from its legislative phraseology, is that it burdens the Federal courts as guardians of the Constitution: for, unless the Constitution is to become as easily susceptible to amendment as a Congressional enactment, it will, whenever current public opinion fails to lead to "appropriate" legislation even as regards the Amendment's more radical reaches, throw the burden on the courts themselves enforcing it. Their alternative, of allowing the Constitution to come into disrepute through neglect, is unthinkable. Regardless of Congressional action the Eighteenth Amendment will continue to read that the manufacture, sale, or transportation of intoxicating liquor for beverage purposes "is hereby prohibited." And, according to Article 6, paragraph 2, of the Constitution, it will be the "supreme law of the land."

Heretofore even the Thirteenth and Fifteenth Amendments had contented themselves with declaratory phraseology. They were declaratory of a right that could be protected in the absence of appropriate Congressional legislation, by merely holding void any contravening acts. But rather, this is a case where violations are sure to occur while at the same time they cannot be called void. The Eighteenth Amendment is a police law, and must find its enforcement through punishment. So the courts must punish, with or without particular Congressional sanction. The cases brought to their attention will be numerous. Current public opinion may be inert, if not hostile.

Why all this when (1) Congress could always, as far as current public opinion justified, have regulated liquor by taxation as it has heretofore done with opium and even State Bank notes. And (2) the amendment itself could have contented itself with following the path blazed by the Constitution's framers, of granting to Congress *power* over liquor, and leaving the exercise of the power to depend on current public opinion.

That the courts can (and so *must*) enforce the Eighteenth Amendment regardless of particular Congressional sanction follows from (1) the courts, given jurisdiction, have inherent powers of a court. (2) Jurisdiction is given by (a) the amendment's creation of the offense, and (b) the grant of jurisdiction in Section 24 of the United States Judicial Code, over "offenses."

The courts, then, must define "intoxicating" liquor and should apply that definition to whatever liquor is sold, manufactured or transported. This follows, because the amendment prohibits sale or manufacture or transportation of the identical object—namely intoxicating liquors. Manufacture, sale and transportation are on the same level.

Now, in the absence of enforcement legislation, can the United States courts enforce the article? In ascertaining whether the court can take cognizance of violations of the Eighteenth Amendment, without Congressional sanction, what are the reasons that have heretofore led the courts to assert that in the United States courts there are no common-law crimes, but only statutory ones? The courts, then, starting with a bias against infringing State sovereignty, have held first that the United States Government is a government of powers, and secondly, that the lower United States courts, deriving their existence exclusively from Congress, have only such jurisdiction as Congress authorizes. As to the first—the matter of powers—Congress must avail itself of a power before there is a law. As to the second—the matter of jurisdiction—there must not only be a law creating the crime, but also one giving a specified court the right to deal with the crime. These

two requisites coupled (if the Eighteenth Amendment is part of the Constitution) with the absence of cause for any prejudice against infringing State's rights, we find regarding the Eighteenth Amendment. In the first place, the prohibiting part of the amendment, section 1, is itself a self-executing law, and not an unexecuted power. In the second place, jurisdiction of the offenses is given the United States District Courts by Sec. 24 of the Judicial Code. And in the third place (beside the power to prohibit being itself executed by the constitutional prohibition), in Sec. 2 of the amendment, power to enforce the prohibition is granted concurrently to the National and State Governments.

The stress laid in United States v. Hudson[1] on the United States being a government of limited powers enumerated,[2] so that it took an act of Congress to exercise the power, is not applicable as regards the Eighteenth Amendment; for that amendment is essentially legislative in character. Its language is "is hereby prohibited." True there is in addition power vested in the Congress and in the several States to enforce this prohibition by additional legislation. But in the absence of such additional legislation, the article still prohibits the manufacture, etc., of intoxicating liquors for beverage purposes, and if a part of the Constitution is, of course, the law.[3]

It is not merely declaratory, but is the execution of a power. The amendment could not, or would not, of course, fix penalties, but by providing for "appropriate" legislation, left them to the control of Congress if it should choose to legislate. Meantime the courts are free to use their discretion. The fact that in United States v. Reese[4] the Court summarily dismissed the first section of the Enforcement Act because it lacked penalties, is not a valid objection to this theory because (1) no objection to such course seems to have been in the mind of the Court, and (2) the Court refers to the section as merely declaratory of a right, and (3) the rule of construction that the expression of one is the exclusion of the other, which may well govern when Congress is covering a subject, ought not to prevail in the case of the Eighteenth Amendment, where the prohibition is broadly announced and where it would be extremely unwise to fix permanent and unchangeable penalties.[5]

It is true that the United States District Court has only such jurisdiction as Congress bestowed upon it. It is said in United States v. Hall:[6]

(District and Circuit courts) "possess no jurisdiction over crimes and offenses committed against the authority of the U. S. except what is given them by the power that created them nor can they be invested with any such jurisdiction beyond what the power ceded to the U. S. by the Constitution authorizes Congress to confer, from which it follows that before an offense can become cognizable in the Circuit court, the Congress must define or recognize it as such and affix a punishment to it, and confer jurisdiction upon some court to try the offender. U. S. v. Hudson, 7 Cr. 32; U. S. v. Coolidge, 1 Wheat. 415; 1 Am. Cr. L. 163."

Mr. Justice Clifford, in United States v. Hall, also drops the significant remark that it has never been decided whether the court could take jurisdiction of treason (defined in the Constitution) without Congressional enactment. He says that "treason is defined by the Constitution, but it has never been decided that the offender could be tried and punished for the offense until some court is vested with the power by act of Congress."

Mr. Justice Miller, in United States v. Holliday,[7] says that at the time the Judiciary Act was passed "there was * * * no such thing as an offense against the

(1) 7 Cranch. 32.
(2) See Gibbons v. Ogden, 9 Wheat. 1.
(3) Art. 6, Par. 2.
(4) 92 U. S. 214.
(5) See M'Cullogh v. Md., 4 Wh. 316, 415.
(6) 98 U. S. 343.
(7) 3 Wall 183.

United States, unless it was treason as defined in the Constitution." How much more reason is there to allow the courts jurisdiction where the Eighteenth Amendment prohibits, instead of merely defining. In each instance Congress is given power—which they may choose or not to exercise—to fix penalties.

Now Sec. 24 of the Judicial Code of March 3, 1911, c. 231, 36 Stat. 1091, gives the District Court jurisdiction of all "crimes and offenses cognizable under the authority of the United States;" and Sec. 262 of the same code gives the court authority to issue all writs necessary to the exercise of its jurisdiction and agreeable to the usages of law. If then the Eighteenth Amendment establishes the offense, is it necessary that any written law should prescribe the punishment? Power to sentence should be implied from jurisdiction over an offense. The United States judicial power extends "to all cases arising under this Constitution."[8]

In Virginia v. West Virginia[9] the Court said at page 591 that judicial power involves the right to enforce the results of its exertion. Jurisdiction has been given the District Courts, and jurisdiction is the power to hear and determine. Judgment is not the end of determination. In Wayman v. Southard[10] the Court said that jurisdiction is not exhausted by rendition of judgment.

Jurisdiction of the offense once taken, under Sec. 24, supra, the Court should, in order to preserve the Constitution from becoming a blue law, follow the practice of common-law courts and impose such penalties as in its discretion are sufficient to insure obedience to law. It would seem that Sec. 262, supra, would give the right to issue the necessary writs to enforce its penalty. The court has long punished contempts in the exercise of such discretion. Indeed, contempts are within the inherent jurisdiction of the court in the absence of Congressional legislation.[11]

It only remains then to point out that violations of the Eighteenth Amendment are offenses. In this regard, it is significant to notice the variations of language from that favored in the previous amendments. In them the language is mandatory or prohibitory—shall or shall not. Does not the mandatory language merely mean to make unconstitutional, null and void, any act contravening the mandate or prohibition? In the Civil Rights Cases,[12] it is said:

(The Fourteenth Amendment) "nullifies and makes void all state legislation and state action of every kind, which impairs the privileges and immunities of citizens of the U. S., or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere brutum fulmen, the last section of the amendment invests Congress with power to enforce it with appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void and innocuous."

But the language "is prohibited" not only makes a contravening act void, but makes a violation an offense. The State or even Congress itself, cannot authorize the manufacture, sale or transportation of intoxicating liquors, and the act of manufacture, etc., is criminal, and the court is left to its sound discretion (in the absence of Congressional legislation) to fix the penalty.

In any event, where there was a conspiracy to sell, etc., the conspiracy should be punishable under Sec. 37 of the United

(8) Art. 3, Sec. 2.
(9) 246 U. S. 565.
(10) 10 Wheat. 1, 2, 3.
(11) U. S. v. Hudson, 7 Cranch. 32.
(12) 109 U. S. 3.

States Criminal Code, which makes it a crime to conspire to commit "any offense" against the United States.

RAYMOND G. BROWN.

Dover, N. H.

BROKERS—DUAL AGENCY.

TWISS v. HERBST.

Supreme Court of Errors of Connecticut. July 20, 1920.

111 Atl. 201.

Public policy forbids a real estate broker to act for both parties to an exchange of land, in absence of their knowledge that he is so acting and their express or implied assent thereto; and one who acts in violation of this rule cannot recover for his services, even on an express promise, and even though the exchange of property was of value to the owner; but, if both parties have knowledge that the broker is acting for them both, and do not object thereto, but allow him to do so, they will be held to have assented to his acting in a double capacity.

This is an action for an injunction restraining the defendant from negotiating a note and from assigning the mortgage given to secure the same, and for the delivery of the note to the plaintiff and the release and cancellation of the mortgage. There were two counts in the complaint relating to different transactions. The first was decided in favor of the defendant and is not connected with this appeal. Under the second count the court found the facts in substance as follows:

The plaintiff had employed the defendant as her broker in a prior real estate transaction, and as a result had become the owner of an apartment block in Waterbury. Finding the block too big for her convenience, she requested the defendant to sell or exchange it. At this time one German and his wife, owning real estate in Waterbury, placed it with the defendant for sale. The defendant informed the plaintiff that he might effect an exchange of the two properties, and requested her to look over the German property. She did so, and came to the conclusion that she would exchange her property for this, if satisfactory terms could be arranged. The defendant informed the plaintiff that he would interview the Germans, and, if a deal was consummated, he would expect a commission of $1,000 from her in payment of his services rendered her in making the exchange. The plaintiff accepted defendant's proposition and agreed in writing to pay him $1,000 for his services if the exchange of properties was consummated. The defendant negotiated with the plaintiff and with the Germans as to an exchange of equities, and as a result of his negotiations it was agreed that there should be an exchange of equities; the Germans to pay the plaintiff $500 cash in addition to the conveyance of their equities. The plaintiff accepted the proposition negotiated by the defendant; a contract drawn by the defendant for the exchange of properties was made between the parties, the defendant signing the contract as plaintiff's agent, and this contract was signed by the plaintiff before the deeds were passed. Thereafter deeds were passed and the exchange was completed.

Upon completing the exchange, the plaintiff executed and delivered a note for $1,000 to the defendant for his services as agreed, and also gave defendant a mortgage to secure this note. The defendant received the sum of $315 from the Germans as a commission in payment of the services he rendered them in the exchange. The defendant never informed the plainitff that he was to receive or that he did receive a commission from the Germans in this transaction, and she did not know such fact. No sort of duress was practiced by the defendant on the plaintiff in the making and delivering of the said note and mortgage, except such, if any, as arises from the other facts in the case. The defendant believed that he could collect a commission from each party in the exchange. whether or not the party knew that he was to be paid, or had been paid, a commission by the other party. As a result of the services rendered by the defendant for the plaintiff, she increased the value of her holdings, and to this extent the defendants' services were of value to her.

On these facts the court found that the defendant was acting as the agent of the Germans, and not as agent of the plaintiff, and rendered judgment for an injunction as prayed for, for the surrender of the note, and the release and cancellation of the mortgage. The defendant appeals, for the various reasons noticed in the opinion.

GAGER, J. (after stating the facts as above). [1] In Zimmerman v. Garvey, 81 Conn. 570, 71 Atl. 780, the duty of real estate brokers with respect to fidelity to their clients was clearly and concisely stated by this court:

"A recognized rule of public policy forbids a real estate broker, as it does agents generally, to act for both parties to a transaction, in the absence of their knowledge that he is so act-

ing, and their express or implied assent thereto. One who acts in violation of this rule cannot recover for his services, even upon an express promise. Farnsworth v. Hemmer, 1 Allen (Mass.) 494; Carman v. Beach, 63 N. Y. 97; Bell v. McConnell, 37 Ohio St. 396. 'If, however, both parties have knowledge that the broker is acting for them both, and do not object thereto, but allow him to so act, and agree to pay him commissions, they will be held to have assented to his acting in a double capacity, and neither party can object thereafter.' 2 Clark & Skyles on Agency, § 765 (b); Rice v. Wood, 113 Mass.' 133; Rowe v. Stevens, 53 N. Y. 621; Bell v. McConnell, 37 Ohio St. 396."

The Zimmerman Case is cited with approval in Summa v. Dereskiawicz, 82 Conn. 551, 74 Atl. 906. That the law thus stated is thoroughly settled, see further authorities, especially as relating to the first part of the quotation from the Zimmerman Case; Mechem on Agency (2d Ed.) § 2412; 21 R. C. L. p. 827; § 11; 2 C. J. pp. 712, 763; McLure v. Luke, 84 C. C. A. 1, 154 Fed. 647, 24 L. R. A. (N. S.) 659.

The broker violating the rule, as stated in the Zimmerman Case, cannot recover for his services, even though these services are of value to his principal. The ground of the rule is not the fact of loss or gain to the principal, but the violation of an imperative rule of public policy requiring the utmost good faith on the part of the agent and that, in the absence of knowledge and assent of his principal, he shall not at the same time represent an interest inconsistent with or adverse to that of his principal. See Quinn v. Burton, 195 Mass. 277, 81 N. E. 257. The contract will be avoided on account of its necessarily injurious tendency. Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 459. The agent cannot serve two masters in the same transaction. As pointed out in British America Ins. Co. v. Cooper, 6 Colo. App. 25, 40 Pac. 147, if an agent of two adverse principals is honest, the utmost he can do is to be impartial; but impartiality is exactly the qualification which is inconsistent with agency. The agent is chosen to be a partisan of his principal, not an impartial arbitrator between him and some one else.

The finding is very clear that the defendant in this case was the agent of the Germans to sell their property, and the agent of the plaintiff to sell or exchange her property. That the transaction resulted in an exchange between the two does not affect the character of the defendant's relations to both parties. He negotiated with the parties as to the exchange, and apparently himself doing all the negotiating He drew the contract for the exchange upon the terms the parties finally agreed upon, and signed the agreement for the plaintiff as her agent. He received his commission from the Germans without informing the plaintiff that he received or was to receive such commission, and without her knowledge and consent. and he took the note and mortgage in suit from the plaintiff in compensation for his services to her in making the negotiations with the Germans. The whole exchange, as concluded, is expressly found to have been the result of defendant's negotiations. His conduct certainly shows the action for both parties forbidden by the rule above stated. He was attempting to serve two adverse interests at the same time. Quite irrespective of any actual fraudulent or wrongful intent or conduct, which the finding negatives, the law forbids such action, and denies recovery upon any contract for compensation for services rendered under such circumstances. The conduct of the agent in such case is deemed to be fraudulent, for the purpose of guarding against the mischiefs that must inevitably follow where one permits himself to represent adverse interests in the same transaction; and, as stated in Zimmerman v. Garvey, it is not any rule peculiar to real estate brokers, but is a general rule of agency.

NOTE—*No Right of Broker in Dual Agency to Recover from Either Principal.*—As said in the instant case "the violation of an imperative rule of public policy" such as there proclaimed is frowned upon for its "injurious tendency." But it was held in Cassady v. Carraher, 119 Iowa 500, 93 N. W. 386, that, if a real estate broker acted for both in bringing about a trade he could not recover a commission from either, still if the two treated his employment terminated, yet made an exchange through his instrumentality, they could not escape paying him commissions. The Court said: "This certainly amounted to a ratification of all plaintiff had done in his behalf." This does not appear to me to be true.

In Evans v. Rockett, 32 Pa. Super. Ct. 365, it was ruled that by satisfactory proof it might be shown there was a waiver of double agency. But in Sullivan v. Tufts, 203 Mass. 155, 89 N. E. 239, it was held that if the seller has knowledge of the double agency, but the buyer has not such knowledge it is not a waiver so as to entitle the broker to recover from the seller. The Court said: "The courts as a matter of public policy will not sanction contracts which manifestly place agents when in the performance of their duties not only in a position antagonistic to the interests of their principals, but where they are subjected to a strong incentive to defraud their principals."

This view appears also to have been held, in effect, in Dennison v. Gault, 132 Mo. App. 301, 111 S. W. 844, where it was said: "The plaintiff in order to recover would have to show that not only defendant but also the purchaser of the property was aware of his double agency and to trade with such knowledge." The case was remanded to enable plaintiff to make such

proof. This puts a singular sort of effect on the power of waiver.

In Nekarder v. Presberger, 107 N. Y. Supp. 897, 123 App. Div. 418, a purchaser was the broker's own client, a corporation of which the broker was a director. It was held incumbent on the broker to show that his corporation gave its full consent for him to act before he could recover from the seller. The Court said: "Whether the contract was made with Zamek, for whom he (plaintiff) was attorney or for the benefit of the realty company of which he was director, plaintiff bore to the purchaser a relation of trust and confidence which renders such a contract as he now seeks to enforce illegal and unenforcible, unless it was made with the full knowledge and consent of the purchaser, of which there is no evidence whatever." Again, I do not see how this was material to the seller, if he knew of the double agency. This is hardly like the situation of one knowing that the broker is acting for two principals and committing a fraud in behalf of the one not sued. Featherston v. Trone, 82 Ark. 381, 102 S. W. 196.

But the rule is a good one, because where there is not a complete revelation of the status to all parties there should be no waiver that would make legal any double agency.

C.

CORRESPONDENCE.

THE LEAGUE OF NATIONS AND THE SUPREME COURT.

Editor Central Law Journal:

One favorite argument against the League is that the Supreme Court of the United States, although it has power to decide controversies between the States of the Union, has no power to enforce its decision, and that therefore a league of nations is not necessary to secure the enforcement of the judgments of an international court, which all agree should be established. This statement about the Supreme Court is often made, but like many such statements is altogether erroneous. It overlooks the express provisions of the Constitution and laws of the Union. The Sixth Article of the Constitution is explicit:

"This Constitution, and the laws of the United States which shall be passed in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

It is provided in Article III:

"Section I. The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain or establish."

"Section 2. The judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States and treaties made, or which shall be made under their authority."

The Constitution and laws passed in pursuance thereof are thus made supreme. The judicial power is extended to all cases arising under them, and to all controversies to which the United States, or any State, is a party. This jurisdiction is real and includes a disposition of the whole controversy. Let us then consider what provision has been made to give effect to this jurisdiction.

Section three, article two, of the same Constitution, makes it the duty of the President "to take care that the laws be faithfully executed." When inaugurated he must take the following oath: "I do solemnly swear that I will faithfully execute the office of President of the United States." The same article makes him Commander-in-Chief of the Army and Navy of the United States and thus gives him the power to enforce the laws when they are not obeyed.

Each Federal Court is provided by law with an executive officer called a marshal. It is made the duty of the marshal of the Supreme Court to "serve and execute all powers and orders issuing from it." In cases which go before the court on appeal, the practice is to remand the case to the lower court with instructions to proceed in accordance with the decision of the Supreme Court. The judgment entered on this decision is really that of the Supreme Court. The act of February 28, 1795, re-enacted in Section 798 of the Revised Statutes provided that—

"The marshals and their deputies shall have in each State the same powers in executing the laws of the United States, as the sheriff and their deputies in such State may have by law in executing the laws thereof." This power of the sheriff is to call for aid when necessary, from any persons in the country, the posse comitatus. If there is forcible resistance the aid of the police may be invoked and the Governor may, in case of need, call out the militia.

As the country increased in territory and population, additional provision was made by law for protecting the rights of citizens and enforcing the judgments and orders of the Federal Courts. The Civil Rights Act of May 31, 1870, enacted as follows:

"All persons within the jurisdiction of the United States are entitled to full and equal benefit of all laws and proceedings for the security of persons and property."

Section 13 of the same act provides:

"It shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as may be necessary to aid in the execution of judicial process issued under any of the preceding provisions, or as shall be necessary to prevent the violation and enforce the due execution of the provisions of this Title."

The same act gives authority to United States Commissioners to appoint persons to execute warrants issued by them in the lawful performance of their duties "and the persons so appointed shall have authority to summon and call to their aid the bystanders, or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty to which they are charged."

Thus we see that the United States Courts have full power to enforce their orders. The laws of this country give them full power to do so. In pursuance of this authority at the time of the Pullman strike and the riots which followed it, President Cleveland sent United States troops to the scene of conflagration and suppressed by force disorder of the mob. In the author's book, "Sixty years of American Life," I give detailed account of the judicial proceedings and of the action of the President, with references to the testimony which was taken by the congressional committee, which shows exactly what the President did.*

But, it is said by Dr. Abbott in the Outlook, that both Jefferson and Jackson refused to execute judgments of the Supreme Court. Here again, the facts are misapprehended. Jefferson did criticise the decision of the Supreme Court in Marbury v. Madison, which established the doctrine that the Supreme Court had the right and duty to determine whether or not an act of Congress was authorized by the Constitution. But he had no occasion to decide not to enforce the orders of the Court because the actual decision in that case was in favor of the President's contention and dismissed the proceeding by mandamus against the Secretary of State. All the orders and judgments of the Court were enforced during his administration. In spite of Mr. Jefferson's criticism the Supreme Court has continued to enforce the constitutional provision that the Constitution is the supreme law of the land. The courts in all the States do the same.

*In re Debs, 158 U. S. 564; ex parte Lennon, 166 U. S. 548.

Never was a criticism more unanimously overruled by posterity than this.

The same is true in President Jackson's case. The Supreme Court decided that the laws of the State of Georgia which undertook to dispossess the Cherokee Indians from that State were unlawful. This it did in the case of Worcester. He had been indicted by a Georgia Court for a violation of this law, and had been convicted. The Supreme Court held his conviction illegal. But the Supreme Court felt obliged to decide that it had no original jurisdiction over the suit brought by the Cherokee Nation against the State of Georgia to restrain the officers of that State from seizing the Cherokee lands, but that redress must be sought in another tribunal (5 Peters 1). There was therefore no judgment of the Supreme Court in favor of the Indians which Jackson was called upon to enforce. His declaration that the oath he took was to support the Constitution "as I understand it" and that, therefore, he was not bound by the decision that the Constitution gave Congress power to charter a bank has been unanimously overruled. National banks have been in operation in this country since 1863. Federal Reserve banks are more recent. All of them are chartered under the authority of Congress. Each is now universally recognized.

Thus we see that neither Jefferson nor Jackson actually did refuse to execute a judgment of the Supreme Court and that their respective contentions as to its power have been overruled by the whole country.

Another argument brought forward in the same connection is that before the treaty between the Allies and Germany was made, no one but "extreme radicals" claimed that there should be an international police to enforce the judgments of the international court. The League of Nations is for this reason objected to. The covenant of that League does provide for enforcing the decisions of the Council. It does not propose a separate military organization. Its forces will be composed as the Allied armies have been—of detachments from some or all of the States who are parties to the League, voluntarily furnished by them.

The necessity of some power to enforce the decisions of international tribunals has been long under consideration. It is implied in the first Hague Convention which was ratified by the Senate. This declared that the signatory powers, one of which was the United States, were:

"Recognizing the solidarity which unites the members of the society of civilized nations;

Desirous of extending the empire of law, and of strengthening the appreciation of international justice."

The same declaration was made in the second Hague Convention which was also ratified by the Senate of the United States.

This subject was considered by the Committee on International Arbitration of the New York Bar Association, which reported as long ago as January, 1915, the following resolution:

"That there shall be established an international police force which shall have power to enforce the judgments of the International Court of Arbitration at The Hague, and which may be called upon by that Court at the instance of any party to such treaty, to intervene in case of a threatened violation of any treaty existing between the nations who are parties to the Congress, and to prevent such violation." This resolution was adopted by the association.

In pursuance of the same principle, the League to Enforce Peace which was formed in this country in June, 1915, and of which Ex-President Taft was, and still is, the President, made this exposition of its program:

"Briefly, it is proposed that a League of Nations, including the United States, be created at the end of the present war. An invitation to join the League would probably be extended to all civilized and progressive nations. A general treaty would be signed, by the terms of which the member-nations would mutually agree to submit to public hearing any and all disputes which might arise among them. Such an agreement would not apply to quarrels of a purely national character and would not, therefore, interfere with insurrections or prevent revolutions.

"The military forces of the League would be used to compel submission of matters in dispute to a Court of Inquiry before any war was begun by any member. It is believed that the prolonged postponement, plus the public discussion, plus the justice of the decision or award, would tend to ensure acceptance in the vast majority of cases."

The Executive Council of the American Federation of Labor in its report presented at Buffalo in November, 1917, urged "the combination of the free people of the world in a common covenant for a genuine and practical cooperation to secure justice and therefore peace in relations between nations. A resolution to this effect was adopted by the federation. Similar action was taken by the National Grange in the same month.

These declarations from various influential bodies in America met with general approval. Two very remarkable statements from opposite sources were made in Europe in November, 1916, which showed the prevailing sentiment there. The first was from the German Chancellor von Bethmann-Hollweg:

"When at, and after the end of the war, the world will become fully conscious of its horrifying destruction of life and property, then through the whole of mankind will ring a cry for peaceful arrangements and understanding which, as far as lies in human power, shall avoid the return of such a monstrous catastrophe. This cry will be so powerful and so justified that it must lead to some result."

The other was by our old friend, Lord Bryce:

"The United States has hitherto stood apart in isolation, but isolation is no longer possible. Every country is now affected and its safety threatened by the spirit of anti-democratic aggression. The United States has avoided entangling alliances. But a League of Peace would be no entangling alliance. It would be a smoothing down and straightening out of difficulties that threaten to embroil the world."

We may add that the Outlook itself on the 22nd of June, 1919, printed the last editorial written by Theodore Roosevelt from the Kansas City Star, a few days before he died, in which he takes the same ground and advocates such a League of Nations as that which was afterward agreed upon by the Allied powers and which the Senate of the United States has refused to ratify.

EVERETT P. WHEELER.

New York, N. Y.

HUMOR OF THE LAW.

IN RE SPRATT v. SPRATT.

Draw up the papers, lawyer, and make 'em good and stout;
For things are strained at the apartment, and Nellie and I are out.
Draw up the papers, lawyer, for things are wrong at the flat;
I'm a Republican voter, and Nell is a Democrat.

Judge Orrin F. Carter of the Supreme Court of Illinois told a good story on himself at the banquet of the Judicial Section of the American Bar Association on August 25, 1920.

A certain damage lawyer had won a judgment of $2,000 on appeal. After deducting a generous fee of one half, the attorney then deducted a liberal amount for court expenses which left a very small share for the client.

The client, a few days after, read the opinion of the Court in his case and at the close of the opinion noticed the statement that "Carter, J. took no part."

"How fortunate I am," he exclaimed. "If Judge Carter had taken his part there would have been nothing left for me."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adoption**—Name of Adoptee.—It was not necessary for adopted child to take the name of her adopting parents.—Craddock v. Johnson, Mo., 223 S. W. 925.

2. **Adverse Possession**—Constructive Possession.—There can be no constructive adverse possession of land against the owner, where there has been no actual possession which he could treat as a trespass and bring action for.—Clary v. Bonnett, S. C., 103 S. E. 779.

3. **Attorney and Client**—Compromise.—There was a compromise of the claim of plaintiff whose husband was killed in a railroad accident within the meaning of the word as used in her contract with her attorneys, where the road settled the claim, although it required a friendly suit to be brought against it to establish plaintiff's status as the wife of deceased.—Heller v. McGilvray, Mo., 223 S. W. 970.

4.——Discharge.—A discharge of an attorney by his client does not constitute a breach of a contract between them, and the attorney is not entitled to the compensation agreed upon in the contract, but only to the reasonable value of the services which he has rendered, although the contract may well be considered in determining what, as contemplated by the parties themselves, would be the reasonable value of the services rendered.—Ritz v. Carpenter, S. D., 178 N. W. 877.

5. **Bills and Notes**—Negotiability.—If a note is secured by a mortgage on land, and both are executed at the same time, or as parts of one transaction, the note, though negotiable in form, is not negotiable in law, if the purchaser takes it with knowledge of the existence of the mortgage.—W. P. Fuller Co. v. McClure, Cal., 191 Pac. 1027.

6. **Boundaries**—Description.—In a boundary controversy, where the beginning corner is not identified and certain, it is as lawful to reverse the calls as to follow the order given in the deed; but if the beginning corner can be identified, the footsteps of the surveyor must be followed, and if the beginning corner can be fixed with certainty, the called-for courses and distances as given in the deed must yield, if inconsistent.—Tomlinson v. Noel, Tex., 223 S. W. 1028.

7. **Brokers**—Tender.—Where defendant vendors refused to sell before prospective purchaser had opportunity to show his ability to make the cash payment required, it was unnecessary for purchaser to tender the cash required to bind the sale.—Merzoian v. Kludjian, Cal., 191 Pac. 673.

8. **Burglary**—Allegata and Probata.—Where an indictment for burglary of a dwelling house particularly described the premises in which the articles taken were kept, etc., the averment, though unnecessary, must be proven to sustain a conviction.—Porter v. State, Ala., 86 So. 143.

9. **Carriers of Passengers**—Insane Party.—A carrier cannot absolutely refuse transportation to insane persons, but has the right to require that such a passenger be in charge of a competent attendant, and, if necessary to the reasonable safety and comfort of other passengers, to remove such passenger from the train at the first station where he may be properly cared for.—Hines, Director General of Railroads, v. Miniard, Ala., 86 So. 23.

10.——Protection by Carrier.—With respect to violation of a passenger's rights by others than the carrier's agents, the carrier's duty to protect the passenger is not absolute, but is discharged by using every reasonable means to conserve his convenience, comfort, and safety; the carrier not being an insurer.—Ex parte Alabama Great Southern R. Co., Ala., 86 So. 100.

11.——Waiver.—An employe of a carrier when off duty, riding on the carrier's vehicle designated for the transportation of passengers by permission of those in charge, is to be treated as a passenger, though no fare is exacted from him, unless he is carried on a pass in accepting which he has expressly waived his right to claim compensation for injuries while being carried.—Nashville Ry. & Light Co. v. Overby, Tenn., 223 S. W. 997.

12. **Chattel Mortgages**—Crops.—Mortgage on crops to be grown on certain land, executed at the time when mortgagor had no leasehold or other interest in such land, was invalid; the corn to be grown having no potential existence.—Gray v. Burdett, Ala., 86 So. 95.

13. **Commerce**—Telegram Relayed.—A contract, made in the state for the transmission of a message from one point to another point therein, was not subject to the federal law governing interstate transactions under amended Act of Congress of June 18, 1910, though the telegraph company transmitted message by way of a relay station in another state.—Western Union Telegraph Co. v. Glover, Ala., 86 So. 158.

14. **Constitutional Law**—Police Power.—The "police power" is an attribute of sovereignty, and whatever measures are reasonably necessary to advance the peace, safety, morals, and best interests of the public may be adopted under it.—City of Cincinnati v. Harth, Ohio, 128 N. E. 263.

15.——Quasi Contracts.—The constitutional provisions against impairing the obligation of a contract apply only to voluntary contracts, and not to obligations imposed by law without the assent of the party bound. That class of obligations, aptly styled "quasi contracts," are not embraced within said provisions.—Board of Com'rs of Everglades Drainage Dist. v. Forbes Pioneer Boat Line., Fla., 86 So. 199.

16.——Uniform Legislation.—Old age cannot give validity to a void statute, nor will acquiescence for any length of time, nor practical instruction, prevent a court from declaring void a statute which clearly contravenes the Constitution, but the uniform legislative interpretation of doubtful constitutional provisions, running through many years, is of weighty consideration

with the courts.—Parke v. Bradley, Ala., 86 So. 28.

17. **Contracts**—Ambiguity.—Where an oral contract, as one between an attorney and his claimed client, is susceptible of more than one meaning, its construction becomes a question for the jury.—Holloway v. Bradshaw, Mo., 223 S. W. 968.

18.——Consideration.—If one by a promise induces the promisee, or some other person on account of or for the benefit of the promisee, to do some act or part with some chattel, title, interest, privilege, or right which the law regards as of some value, there is sufficient consideration for the promise.—State v. Lum, Conn., 111 Atl. 190.

19.——Place of Contract.—The obligation of a contract is determined by the law in force when it is made, since existing statutes enter into the terms of a contract by implication.—People v. Nixon, N. Y., 128 N. E. 245.

20.——Preliminary Agreement.—Where the parties act under a preliminary agreement, they will be held to be bound, though a formal contract has never been executed.—Empson Packing Co. v. Lamb-Davis Lumber Co., Wash., 191 Pac. 833.

21.——Unilateral.—A contract of which the obligations are mutually binding upon the parties thereto is not rendered unilateral merely because matters concerning the details of performance are left to the option of one of the contractors.—Seabrook Coal Co. v. Moore, Ga., 103 S. E. 839.

22. **Corporations**—Holding Out.—Where a corporation succeeding a firm conducted correspondence in part on the firm letter heads, and performed the only contract made by the firm with another, it will be deemed to have adopted the contract and to be bound.—J. L. Mott Iron Works v. Kaiser Co., S. C., 103 S. E. 783.

23.——Ultra Vires.—As a general rule, the defense of ultra vires to a corporation's suit must be pleaded to be available.—Coliseum Athletic Ass'n v. Dillon, Mo., 223 S. W. 955.

24. **Criminal Law**—Assignments of Error.—In order to merit consideration by this court, assignments of error must be argued, unless the error complained of is so glaring or patent that no argument is needed to demonstrate it.—Blackwell v. State, Fla., 86 So. 224.

25.——Expert Testimony.—Medical books and books on the subject of surgery may be offered in evidence in connection with expert testimony.—Haswell v. State, Ala., 86 So. 170.

26.——Impeaching Verdict.—The affidavits of jurors cannot in criminal cases be used as evidence to impeach their verdict.—Clemons v. State, Ala., 86 So. 177.

27.——Jeopardy.—A plea of former jeopardy may be waived.—McKinney v. State, Ala., 86 So. 121.

28. **Damages**—Minimize.—When a house mover encountered a pole of a power company obstructing the street, he could not sit by and recover for such idle time, but was under the duty to act promptly and to minimize the damages as much as possible, and to do everything reasonable to such end.—Birmingham Ry., Light & Power Co., v. Ashworth, Ala., 86 So. 82.

29. **Dedication**—Offer and Acceptance.—A dedication, like a contract, consists of an offer and acceptance, and is not binding until acceptance, proof of which must be unequivocal.—Inyo County v. Given. Cal., 191 Pac. 688.

30. **Deeds**—Cancellation.—In a suit to cancel a deed valid on its face, the burden is on the plaintiffs to show fraud, deceit, or misrepresentations by convincing evidence.—Camp v. Kimbley, Ky., 223 S. W. 1005.

31. **Descent and Distribution**—Vesting of Estate.—The property of an intestate decedent vests in his heirs on his death, subject to the burdens imposed on it by the law in force at that time for the purpose of paying the debts of the decedent and the expenses of the administration of the estate, and also subject to the sale by the executor or administrator for such reasons and purposes as may then be authorized by law.—In re Benvenuto's Estate, Cal., 191 Pac. 678.

32. **Divorce**—Custody of Child.—The welfare of the child is the primary consideration in a proceeding involving the question of its custody, so, where changed conditions necessitate, the court, having before it the children, may make an award of custody inconsistent with a foreign judgment regulating their custody.—In re Leete, Mo., 223 S. W. 962.

33. **Electricity**—Due Care.—The care required in the use of electricity must be measured by the character of its danger to be determined from the conditions existing.—Snyder v. Wagner Electric Mfg. Co. of St. Louis, Mo., 223 S. W. 911.

34. **Estoppel**—Fraud.—Where one of two innocent persons must suffer by the fraudulent act of a third, it must be he who trusted most, or he whose misplaced confidence enabled the wrong to be committed.—Butters v. Brawley Star, Cal., 191 Pac. 987.

35. **Evidence**—Burden of Proof.—A plea denying the existence of the relation in which defendants are sued imposes upon the plaintiff the burden of proving the existence of the relation as alleged.—Mach v. Mayo, Fla., 86 So. 222.

36.——Consideration.—While no evidence is admissible to prove that a plain and unambiguous written contract was intended to impose a greater or less obligation than its terms import, such evidence is always admissible to show want of consideration or payment or other satisfaction of a promissory note.—Griswold v. Frame, Cal., 191 Pac. 962.

37. **Executors and Administrators**—Appointment.—An heir's right of preference to appointment as administrator under Probate Code, § 61, is a preference to appointment only, and does not entitle her to nominate another to be appointed; the right to nominate another extending only to the surviving spouse.—In re Utter's Estate, Wash., 191 Pac. 836.

38.——Chattel Mortgage.—Generally a chattel mortgage executed by a husband must, on his death, yield to the right of his family to a year's support out of his estate.—Southern Oldsmobile Co. v. Baker, Ga., 103 S. E. 826.

39.——Claim.—A claim against a decedent's estate on a note unconditioned on its face need not allege the existence and fulfillment of an extrinsic condition to the liability of decedent on the note.—Thompson v. Koeller, Cal., 191 Pac. 927.

40.——Heirlooms.—While equity will decree specific delivery of works of art, heirlooms, etc., which are incapable of duplication or for which the owner has a personal attachment, if the loss could not adequately be compensated in damages, it will not decree the specific delivery of an art collection to a collector of decedent's estate, where the bill merely alleged that the collection was the property of the estate, and did not even disclose the disposition made thereof by the will.—Dante v. Hutchins, D. C., 265 Fed. 988.

41. **Fixtures**—Elevator.—An elevator installed in an apartment building under construction, under an agreement with the owner that title should remain in the elevator company until paid for, was a fixture and a part of the realty, as between the owner of the building and persons claiming as mortgagees or mechanic's lien claimants.—King v. Blickfeldt, Wash., 191 Pac. 748.

42. **Frauds, Statute of**—Oral Agreement.—An oral agreement between grantor and grantee in a deed that the grantor should be allowed one year in which to redeem or take back the property was one relating to real property and unenforceable under the statute.—John R. O'Reilly, Inc., v. Tillman, Wash., 191 Pac. 866.

43.——Sufficient Memorandum.—Where memorandum signed by seller did not sufficiently describe the quantity of the goods to be sold, seller could not be held liable for breach of the contract on letter from buyer designating such quantity, since it could not be charged on a memorandum which it did not sign.—Lewis v. Elliott Bay Logging Co., Wash., 191 Pac. 803.

44. **Garnishment**—Ownership of Draft.—Where a bank became absolute owner of a draft,

the proceeds could not be garnished on a claim against the drawer, for the drawer had no interest in the proceeds.—Vickers v. Machinery Warehouse & Sales Co., Wash., 191 Pac. 869.

45. **Gas**—Res Ipsa Loquitur.—The mere fact of an explosion does not make out a prima facie case against a gas company; the doctrine of res ipsa loquitur or, what is only another name therefor if nothing but the explosion appears, of presumed negligence, not applying.—Nomath Hotel Co. v. Kansas City Gas Co., Mo., 223 S. W. 975.

46. **Guaranty**—Consideration.—The furnishing of material to another corporation in reliance on the guaranty of defendant that the material would be paid for is sufficient consideration for the guaranty, if any is necessary to make it binding.—Woods Lumber Co. v. Moore, Cal., 191 Pac. 905.

47.——Laches.—Assignee from vendors of contract for deed, suing on vendor's guaranty of payment of price in full by buyer, held not guilty of laches in failing to bring action within reasonable time to estop him from asserting any right in the guaranty or contract sued on; the action having been brought before limitations had run.—Hardinger v. Harnsworth, Wash., 191 Pac. 755.

48. **Highways**—Regulation.—The state has full power to regulate the use of motor vehicles on its highways and may exact reasonable compensation for special facilities afforded, and make reasonable provision to insure safety.—Saviers v. Smith, Ohio, 128 N. E. 269.

49. **Homestead**—Beneficial Owner.—If Kansas homestead of husband and wife was put in wife's name only colorably, with understanding husband should continue beneficial owner, and was then traded for Missouri property, title to which was taken in wife's name with same understanding, husband paid for and became owner of Missouri property, and his creditor can proceed against it to collect his judgment, though original Kansas property could not have been proceeded against in hands of the wife, being exempt and of no concern to creditors.—Steele v. Reid, Mo., 223 S. W. 881.

50. **Homicide**—Defense of Another.—The right of one to defend another is co-extensive with the right of the one to defend himself, and the one who defends the other is upon no higher plane than the one defended, and so, if the one defended is not free from fault in bringing on the difficulty, his defender cannot be.—Cain v. State, Ala., 86 So. 166.

51.——Malice.—Under Penal Law, § 1050, as well as under the common law, manslaughter is the unlawful killing of another without malice or intent.—People v. Santoro, N. Y., 128 N. E. 234.

52.——Variance.—Variance between indictment,, charging that defendant killed "Red Nelson," and proof showing that the name of deceased was "William Phillips" or "Webster Nelson," was not fatal, where all the witnesses in their testimony referred to deceased as "Red Nelson," and the undisputed evidence showed that deceased was commonly known and always called by such name.—Montgomery v. State, Ala., 86 So. 132.

53. **Husband and Wife**—Community Property.—Where a house was improved with community funds, the improvements belong to the spouse owning the land.—Potter v. Smith, Cal., 191 Pac. 1023.

54. **Infants**—Emancipation.—Prior to the emancipation of an infant, he cannot recover in an action for damages for personal injuries for loss of time, or for expenses in the cure of his injuries.—Doullut & Williams v. Hoffman, Ala., 86 So. 73.

55.——Ratification.—Though the minor has wasted or spent the consideration received, he may avoid settlement made during minority, without offering to return the property or money received by him, or to restore the status quo.—Hines, Director General of Railroads, v. Seibels, Ala., 86 So. 43.

56. **Insurance**—Acceptance of Policy.—An insurance company may make a binding contract of insurance by delivering a policy and accepting the premium thereon, even though the insured never requested that the policy be issued.—T. E. Haddox & Co. v. Ohio Valley Fire & Marine Ins. Co., Ky., 223 S. W. 1009.

57. **Interest**—Statute.—In an action by the District of Columbia to recover from a terminal company the cost of lighting streets under viaducts, as authorized by Act May 26, 1908, the liability is fixed by statute, and the action is for a liquidated sum, so that interest was properly allowed.—Washington Terminal Co. v. District of Columbia, D. C., 265 Fed. 965.

58. **Judges**—Exercising Functions.—A judge cannot, after leaving a district in which he has presided at a trial, render judgment therein, or make any order other than as authorized by statute or agreement of the parties.—McIntyre v. Northern Pac. Ry. Co., Mont., 191 Pac. 1065.

59. **Judicial Sales**—Confirmation.—A purchaser at judicial sale is entitled to have the sale confirmed by the court in the absence of irregularity, misconduct, fraud, mistake, or gross inadequacy of price amounting in itself to fraud.—Harduval et al. v. Merchants' & Mechanics' Trust & Savings Bank, Ala., 86 So. 52.

60. **Judgment**—Invalidity.—When the record shows due service of process or notice, and a judgment rendered is not void on its face, the court which rendered it cannot, after the lapse of the term, alter or vacate it on the motion of either of the parties; the only remedy then available being a petition for a rehearing under the provisions of Code 1907, §§ 5371-5376, or by bill in chancery.—Ex parte Brickell, Ala., 86 So. 1.

61. **Landlord and Tenant**—Occupancy.—The occupancy of a house, by a man hired to operate a farm for a certain monthly wage and the use of the house thereon, to live in with his family, is incidental to the employment, and the right thereto ceases with the termination of the service. In such case the possession of the employe is in legal effect the possession of the employer.—Davis v. Long, N. D., 178 N. W. 936.

62. **Libel and Slander**—Good Faith.—Generally, a newspaper publisher may, when done in good faith and without intent to injure, print and circulate any item, whether true or false, without pecuniary or criminal liability other than that arising from loss of confidence and esteem in the minds of the public, but he is responsible for an abuse of that privilege and may be punished for the publication of a libel.—Wortham-Carter Pub. Co. v. Little-Page, Tex., 223 S. W. 1043.

63. **Marriage**—Burden of Proof.—One proceeding against an estate as a common-law wife of the deceased to enforce the rights of a widow has the burden of proof upon the issue of marriage.—Perkins v. Silverman, Mo., 223 S. W. 895.

64. **Master and Servant**—Respondeat Superior.—Where a chauffeur, having taken his employer and wife to the home of friends, obtained permission to return to town, instead of waiting, as was usual, his object being to finish his own shopping and to go home and be with his wife during an approaching storm, the employer was not liable for negligence of the chauffeur on his return trip from the town.—Adomaities v. Hopkins, Conn., 111 Atl. 178.

65.——Respondeat Superior.—One who hires and obtains control of vehicle and driver under agreement to pay specified amount per day therefor is responsible for any injuries caused by vehicle and driver, if due to driver's negligence, even though driver is paid by owner.—Olson v. Clark, Wash., 191 Pac. 810.

66. **Mechanics' Liens**—Homestead.—Where action was brought to foreclose a mechanic's lien on a homestead, recovery could not be had and the property sold on the ground that the improvement was an integral part of the homestead, and that the debt for material furnished was a part of the purchase price, under Rev. Code, 1919, §§ 455, 1689.—Schoeneman Bros. Co. v. Loffer, S. D., 178 N. W. 934.

67.——Husband and Wife.—"A mechanic's lien cannot be created upon the land of a married woman for work done or materials furnished in improving such lands under a contract with her husband, where the husband acts merely

for himself."—Thomas v. George, Neb., 178 N. W. 922.

68. **Mines and Minerals**—Optional Lease.—In a suit to declare an optional lease terminated for nonperformance of the express conditions on which its continuation depended, the general rule that a court of equity will not enforce a forfeiture, but will often lend its aid to prevent one, does not apply.—Ford v. Cochran, Tex., 223 S. W. 1041.

69.——Undue Influence.—In the absence of undue influence, or fraud inducing execution of oil and gas lease on royalty, the cash consideration of $1 will not be treated as a nominal consideration only, but is sufficient to support an option given the lessee to continue the lease by construction of a well or payment of annual rentals.—Leath v. Humble Oil & Refining Co., Tex., 223 S. W. 1022.

70. **Mortgages**—Renewal Note.—Execution of renewal note did not constitute payment so as to satisfy mortgage, since a change in the form of a debt does not affect the security.—Lincoln County State Bank v. Martin, Wash., 191 Pac. 815.

71. **Negligence**—Contributory Negligence.—Contributory negligence of the driver of a private vehicle is not imputable to his guests.—Washington, B. & A. R. Co. v. State, Md., 111 Atl. 164.

72.——Trespasser.—A mere trespasser upon the premises of another can claim from the owner no further duty than that traps or pitfalls may not be set or permitted in his way.—Gandy v. Copeland, Ala., 86 So. 3.

73. **Nuisance**—Important Industry.—A smelter cannot be allowed to operate, where it is a nuisance to the community and injures crops, etc., even if the industry is an important one.—Anderson v. American Smelting & Refining Co., U. S. D. C., 265 Fed. 928.

74.——Injunction.—A court of equity has power in proper case to restrain the construction of buildings for the conduct of a business which will materially injure or annoy adjoining owners, but there must be a threat of actual physical discomfort to persons of ordinary sensibilities and ordinary tastes and habits, such as is unreasonable and in derogation of the complaining party's rights.—Von Hatzfeld v. Neece, Tex., 223 S. W. 1034.

75. **Patents**—Combination of Elements.—The combination with an adding machine of a denominationalizing mechanism, instead of coin ejectors, as in the prior art, which had previously occurred to no one else, discloses invention, since the art is comparatively new, the machines brought into co-operation are complicated, and the advance achieved by that co-operation is marked.—In re Sorum, D. C., 265 Fed. 1000.

76.——Interference.—An applicant, who waited until after an interfering patent had been issued to another before he filed his application, has the burden of proving priority of invention beyond a reasonable doubt.—Pembroke v. Sulzer, D. C., 265 Fed. 996.

77. **Payment**—Mistake of Fact.—One who pays money to another under an honest mistake of fact may, in the absence of an equitable defense, recover the money so paid.—Prowinsky v. Second Nat. Bank, D. C., 265 Fed. 1003.

78. **Principal and Agent**—Burden of Proof.—Plaintiff, having made contract with defendant's agent, knowing agent to have been acting as such, has burden of showing that agent, in making alleged agreement, was acting within the scope of his authority.—Peterkin v. Randolph Marketing Co., Cal., 191 Pac. 947.

79. **Sales**—Acceptance.—Under Sale of Goods Act, § 48, continued possession and use may amount to an acceptance, and so, in an action for the purchase price of a device, a requested charge that the jury might disregard defendant's possession and use was properly refused.—Vapor Vacuum Heating Co. v. Kaltenbach & Stephens, N. J., 111 Atl. 171.

80.——Excuse for Nonperformance.—The seller's giving of mere excuse for non-delivery of grain sold by him, he stating that he could not get cars to load out the shipments, did not alter the essential terms of the bargain.—Pierson-Lathrop Grain Co. v. Barker, Mo., 223 S. W. 941.

81.——Rejection.—Where contract of sale of cream separators specified the price of each machine, buyers were not entitled to reject all because of a defect in one; the contract being several, and not entire.—Associated Mfg. Co. v. Jordan, Tex., 223 S. W. 1050.

82. **Taxation**—Intangible Property.—Intangible personal property, for purposes of taxation, has a legal situs in the state of owner's domicile, even though such property may be evidenced by certificates and documents kept in a distant place.—Commonwealth v. Bingham's Adm'r, Ky., 223 S. W. 999.

83.——Statutory Remedies.—Whenever the statutes of the state provide a mode by which appeals may be taken from the assessment of equalization of property, that remedy is exclusive. Resort cannot be had to equitable remedies.—Busey v. Prehistoric Oil & Gas Co., Okla., 191 Pac. 1033.

84. **Telegraphs and Telephones**—Federal Decision.—Provisions limiting the liability of a telegraph company in case of an unrepeated interstate message to the amount paid for the message are valid under the federal decisions.—Brewer v. Postal Telegraph Cable Co., Mo., 223 S. W. 949.

85. **Trespass**—Husband and Wife.—An attorney for a wife who had had disagreement with her husband cannot justify the removal of the husband's property from the home selected by him during the husband's absence on the ground of instructions by the wife.—Mohn v. Sumner, Cal., 191 Pac. 991.

86. **Trusts**—Conflict of Laws.—A trust agreement concerning Canadian land to be operative in Connecticut, and having beneficiaries who are minor residents of the state, is governed by Connecticut law, though drawn and executed in Canada; where a contract is to be performed, or to have its entire operation and effect, elsewhere, the law of the latter place governs.—McLoughlin v. Shaw, Conn., 111 Atl. 62.

87.——Spendthrift.—A will creating a spendthrift trust in favor of a dissolute son, with directions to the corporate trustee to pay to the son a specified sum per month out of the income and to invest the excess of income and add the same to the principal, with directions that the entire estate be paid over to the son in the event that he pursues a life of sobriety for five consecutive years and submits proof threof to the satisfaction of the trustee, held to create a valid active trust with ample powers in the trustee to effect the testator's intent.—Kerens v. St. Louis Union Trust Co., Mo., 223 S. W. 645.

88. **Usury**—Evasion.—Where the owner of a logging business executed notes for sums larger than the amount borrowed, an agreement by the lender to visit the operations of the borrower, inspect them, and give advice is so vague and indefinite as to show, in connection with the borrower's testimony that the additional sum stated in the notes was compensation for the loan and that the services were valueless to him, that the agreement was an attempt to evade the usury statute.—Robinson, Thieme & Morris v. Whittier, Wash., 191 Pac. 763.

89. **Vendor and Purchaser**—False Representations.—If false representations are not with respect to matters peculiarly within the parties' knowledge, and the other party has means readily available to him of ascertaining the true facts by an exercise of ordinary diligence, he must avail himself of such opportunity, or he will not be heard to complain that he was induced to contract or enter into the transaction by the misrepresentations.—Kaston v. Zimmerman, N. Y., 183 N. Y. Sup. 615.

90. **Wills**—Incompetency.—A feeling, without any justification, different toward the sons than toward the daughters, and the favoring of the daughters in dividing the property in a will, is not alone sufficient to show mental incompetency, though a matter for the jury's consideration.—Boll v. Strand, S. D., 178 N. W. 880.